LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 17 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1069.

IMPARATO STEVEDORING CORPORATION,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF RESPONDENT UNITED STATES LINES COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

JOSEPH M. CUNNINGHAM,
Counsel for Respondent,
United States Lines Company,
120 Broadway,
New York 5, N. Y.

VERNON S. JONES,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

TABLE OF CONTENTS.

	PAGE
Statement	1
The Questions Involved in this Case and Decided Below	2
The Actual Questions Presented	6
Reasons for Denying the Writ	7
(a) There is no Conflict Between the Circuits	7
(b) The Opinion of the Court of Appeals is not contrary to any principle enunciated by this court, or to any decisions of this court	10
(c) The law fully supports the conclusion that under the Jury's findings the Stevedore contractor was negligent	11
Conclusion	15

Table of Cases.

	PAGE
American Export Lines, Inc. v. *Revel*, 266 F. 2d 82 (4 Cir. 1959)	13
Booth Steamship Company, Ltd. v. *Meier and Oelhaf Co.*, 262 F. 2d 310 (1958)	7
Caputo v. *U. S. Lines*, 311 F. 2d 413	2
Cook v. *M/V Wasaborg*, 189 F. Supp. 464 (D. C. Oregon 1960)	13
Crumady v. *Joaquin Hendrik Fisser*, 358 U. S. 423 (1959)	1
Hugev v. *Dampskisaktieselskabet International*, 170 F. Supp. 601 (D. C. S. D. Cal. 1959; aff'd 274 F. 2d 875; cert. den. 363 U. S. 803 (1960)), at p. 609 of 170 F. Supp.	12
Italia Societa Per Azioni Di Navigazione v. *Oregon Stevedoring Co., Inc.*, 310 F. 2d 481 (1962)	7
Nordeutsher Lloyd v. *Brady-Hamilton Stevedoring Co.*, 195 F. Supp. 680 (1961)	13
Parenzan v. *Iino Kaiun Kabushki Kaisya*, 251 F. 2d 928 (2 Cir. 1958)	13
Ryan Stevedoring Co., Inc. v. *Pan-Atlantic S. S. Corporation*, 350 U. S. 124 (1956)	1
Santomarco v. *U. S. A.*, 277 F. 2d 255 (2 Cir. 1960) cert. den. 364 U. S. 823 (1960)	13
Shannon v. *United States*, 235 F. 2d 457 (2 Cir. 1956)	13
Smith v. *Jugosalvenska Linijska Plovidea*, 278 F. 2d 176 (4 Cir. 1960)	13
Waterman Steamship Corporation v. *Dugan & McNamara*, 364 U. S. 421 (1960)	1
Weigel v. *M/V Belgrano*, 188 F. Supp. 605 (D. C. Oregon, 1960)	13
Weyerhaeuser S. S. Co. v. *Nacirema Operating Co.*, 355 U. S. 563 (1958)	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1069.

IMPARATO STEVEDORING CORPORATION,
Petitioner,

v.

UNITED STATES LINES COMPANY,
Respondent.

BRIEF OF THE RESPONDENT, UNITED STATES LINES COMPANY, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

STATEMENT.

The petition is merely another effort by a stevedore contractor to avoid the responsibility to take reasonable efforts to avoid injury to its own employees. To avoid this legal responsibility, the stevedore really seeks the overruling of the cases of *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corporation*, 350 U. S. 124 (1956); *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958); *Crumady* v. *Joaquin Hendrik Fisser*, 358 U. S. 423 (1959); and *Waterman Steamship Corporation* v. *Dugan & McNamara*, 364 U. S. 421 (1960).

The real issues involved have been masked in the petition by creating questions which are said to contain the problems which this Court is asked to review but which only represent

straw-men patched together by the Petitioner to create the illusion that the issues decided are unusual and important and, therefore, warrant examination by this Court.

That the "questions presented" in the petition do not actually contain the "problems" which a review of this case would entail, nor those issues decided by the Courts below, is easily verified by a reference to the opinion of the Court of Appeals (311 F. 2d 413 (1963)). The failure of the Petitioner to make any reference to the only problems involved is an obvious admission that they were decided correctly below and that they do not warrant examination by this Court.

The issue of Stevedore liability decided by the Court of Appeals in this case has actually been decided in the same way by several other Courts of Appeal. In fact, no Court of Appeal, nor any District Court has written an opinion contrary to the holding of the Court of Appeals on the issue of stevedore responsibility. It is very understandable, therefore, why the Petitioner has refused to make a frank statement of the issues.

The Questions Involved in this Case and Decided Below.

The Petitioner does not dispute the holding by the Court of Appeals (*Caputo* v. *U. S. Lines*, 311 F. 2d 413, 415) that, implicit in the jury verdict which found against the shipowner in the primary action was a finding that the plaintiff was injured because improperly stowed cargo in the defendant's vessel created a hazardous working condition and, therefore, an unseaworthy vessel.

This cargo consisted of cases and crates containing United States Air Force general cargo and household goods of Air Force personnel stowed at Cairn Ryan, Scot-

land, by stevedores employed by the Transportation Corps of the British Army, acting as agents of the United States Air Force. The plaintiff claimed that this cargo had not been chocked on being stowed, nor had there been the usual dunnage boards laid between the tiers of cases and crates of which this cargo was composed, as a result of which the plaintiff longshoreman discharging the cargo had no safe walking surface.

The plaintiff and his fellow longshoremen testified that when the No. 1 lower hold was opened, the cargo was "topsy turvy". It looked as if it had been "thrown in", rather than stowed. They called this hazardous working condition to the attention of their supervisor,—also employed by the stevedore. He stayed on the main deck, made no inspection of the cargo to ascertain whether the working conditions were hazardous, but merely answered the longshoremen's complaints by advising that they "do the best you can". The longshoremen testified that, during the discharge of the cargo until the plaintiff was injured, the jumbled stow made the working conditions dangerous.

From the very first pleading in the prime case against the shipowner, throughout the entire trial of the action, and the instruction to the jury by the District Court Judge, there was no reference made to any cause of the accident except the hazardous working condition because the plaintiff was required to work on tilting, wobbly cargo cases, which did not have any dunnage across the top of the cases, and which, therefore, required that the plaintiff walk on thin "veneer-like" casing which would not support the weight of a man. The theory of the plaintiff's case,—and the facts which were put before the jury—was that he, and his co-employees actually attempted to avoid stepping on the "paper-thin" veneer cargo case, but, in view of the fact that there were no dunnage boards on top of the cargo;

MICROCARD
TRADE MARK ®
22
CD17732
MATTHEW BENDER & COMPANY
MB
3-6-3
m
microcard

and, in view of the fact that the cargo was wobbly and tilted, the plaintiff lost his balance, which caused him to miss his step and injure himself by putting his foot through a "paper-thin" veneer cargo casing.

The petition does not ask this Court to review the holding of the Court of Appeals that the findings of fact implicit in the jury verdict were binding upon both the Trial Court and the stevedore; nor the holding that implicit in the jury verdict was a finding that the plaintiff was injured by an obviously hazardous working condition of which the stevedore had notice. The Petitioner, therefore, must also admit that it was error for the District Court Judge iat r to find that "the plaintiff's injuries were due to the latent defect of the crate, not foreseeable by the stevedore, and, hence, not caused by improper stowage" (202 F. Supp. 600, Pg. 606). The District Court judge agreed that, if the plaintiff's injury was caused by a hazardous working condition created by improperly stowed cargo, then the stevedore-contractor would have breached its warranty of workmanlike service, because, under the established law, the stevedore had the responsibility to make the decision,—as an expert in the discharge of cargo from vessels—how best to remedy the hazardous working condition; and, if its decision was that the hazardous working condition could not be remedied, to stop its stevedoring activities until the hazard has been eliminated. The District Court opinion cited numerous cases in support of this rule of law and concluded:

> "If the improper stowage were the sole cause of the injuries then unquestionably the stevedore may be held liable for breach of warranty of workmanlike service. The accident might then have been the foreseeable result of improper stowage" (202 F. Supp. 606).

The District Court judge then erred in concluding that it was a latent defect in a cargo case, rather than the hazards of working on improperly stowed cargo which caused the accident. The Court of Appeals said on this point:

> "The court made formal findings to the effect that the longshoreman was caused to fall when his foot broke through a thin veneer case which contained a board which was apparently sound but was in fact latently defective and that the sole cause of the longshoreman's accident was the latent defect.
>
> "It is the shipowner's contention that the issue of the existence of a latent defect was not submitted to the jury and that the jury's verdict for the plaintiff was based solely upon the longshoreman's claim that the cargo was improperly stowed in that no dunnage was used.
>
> "The point is crucial. The testimony was that the allegedly dangerous condition of the towage was obvious and that the stevedore nevertheless went ahead with the work. This would constitute a breach of the stevedore's warranty to the shipowner of safe performance of the work and render the stevedore liable for indemnity. De Gioia *v.* United States Lines Company, 2 Cir. 304 F. 2d 421. On the other hand, if the accident was caused by a latent defect in the packaging of the cargo, there would have been no breach of the stevedore's warranty and no obligation to indemnify the shipowner. *Ignatyuk* v. *Tramp Chartering Corp.*, 2 Cir., 250 F. 2d 198."

The first of the "Questions Presented" in the petition asserts that indemnity was allowed against the stevedore although a finding was made by the District Court that it was not negligent, and consequently did not breach its warranty of workmanlike service. So-called "automatic" indemnity. The above excerpt from the opinion of the Court of Appeals clearly shows that no holding in the courts

below supports the assertion in the petition that such question was ever involved.

The Actual Questions Presented.

(1) Where a jury has found a shipowner liable to a plaintiff longshoreman for personal injuries resulting from an obviously hazardous working condition in the hold of its vessel,—which existed for hours prior to the accident—because of improperly stowed cargo, is that jury finding binding on a District Court judge who is called upon to decide the third-party action by the shipowner against the stevedore, when the finding of fact made by the District Court judge is based on the same evidence presented to the jury? Or may the shipowner be held liable to the plaintiff on a jury finding, which finding would also make the stevedore liable to the shipowner, both on the facts and law, and then be denied recovery against the third-party defendant-stevedore because the District judge refused to follow the jury findings but made contrary findings of his own, based on testimony on the same issues decided by the jury, but heard after the jury verdict and under which findings the shipowner may not recover indemnity.

(2) Does this Court agree with the opinions of the District Court and the Court of Appeals in this case, and with the numerous opinions by Courts of Appeal and District Courts that a stevedore breaches its warranty to a shipowner that it shall perform the stevedoring work, in which it is a recognized expert, in a safe manner by permitting its employees to work under hazardous working conditions, without taking any reasonable and effective steps to avoid injury to its own employees?

Reasons for Denying the Writ.

(a) *There is no Conflict Between the Circuits.*

The petition points out that this Court has granted certiorari to the Court of Appeals for the 9th Circuit in the case of *Italia Societa Per Azioni Di Navigazione* v. *Oregon Stevedoring Co., Inc.*, 310 F. 2d 481 (1962), and that the present case has a problem which is "part and parcel" of the problem in the *Oregon Stevedoring* case. This statement is simply not so. In the *Oregon Stevedoring* case, the Court of Appeals for the Ninth Circuit held that a contracting stevedore which supplies a latently defective rope cannot be held liable on its warranty of workmanlike service, when the rope breaks due to that latent defect and causes injury to its longshoreman employee. The opinion of the Court of Appeals for the Ninth Circuit in the *Oregon Stevedoring* case is based on the theory that a breach of warranty of workmanlike service only may occur where the warrantor has been negligent and that, consequently, negligence of the Stevedore is a condition precedent to the breach of the warranty. [The holding by the Ninth Circuit in the *Oregon Stevedoring* case is directly contrary to the holding of the Court of Appeals for the Second Circuit in the case of *Booth Steamship Company, Ltd.* v. *Meier and Oelhaf Co.*, 262 F. 2d 310 (1958).]

In the present case, there was never any issue raised in the District Court, nor in the Court of Appeals, nor, indeed, in the Petition to this Court, that, if the injury to the plaintiff was caused by a hazardous working condition, it would not be negligent for the stevedore to permit its longshoremen to continue to work under such dangerous conditions. The only fact witnesses called by the third-party

defendant were called to establish that the cargo was properly stowed.

This testimony by the Stevedore sought to convince the jury that the plaintiff should not recover against the shipowner. After the jury found for the plaintiff, the stevedore then called upon an expert witness in an attempt to convince the trial court that the jury was incorrect and that the accident could not have happened as the plaintiff claimed and the jury found, but as a result of a latent defect in the top of a case.

The trial court based its finding on the testimony of the expert called after the jury trial was concluded. The Court of Appeals held that this was error.

In its briefs and argument to the Court of Appeals, the stevedore did not contest that, if it permitted its longshoremen to continue to work under conditions made hazardous by the condition of the cargo that it would then be guilty of a breach of its warranty of workmanlike service. The stevedore, rather, attempted to support the finding of the District Court judge that the accident was not caused by a dangerous condition of which the third-party defendant had obvious notice, but, rather by a latent defect, which was unknown both to the shipowner and to the stevedore.

The stevedore, in its Petition to this Court, still seeks to rely upon the finding of the District Court judge that the injury was caused by a "latent defect". It persists in ignoring the effect of the jury finding. It also ignores the opinion of the Court of Appeals on the binding effect of the jury finding, although the Court of Appeals made this very clear in its opinion when it said:

> "The court, however, over objection of the shipowner, took additional expert testimony in opposition to the shipowner's claim for indemnity and made the finding above referred to that the sole cause of

the accident was the latent defect in the packing case that plaintiff broke through.

"There is thus squarely raised the question of law whether, when the principal claim is tried to a jury and the third-party plaintiff's claim for indemnity is tried to the court, the court is bound by the verdict of the jury. There can be but one answer to this question. One of the purposes of Rule 14(a) of the Federal Rules of Civil Procedure which allows the bringing in of a third-party defendant is to make the evidence adduced by the plaintiff against the defendant available as a basis for the claim of the third-party plaintiff against the third-party defendant. Inconsistent determinations based upon the same evidence at the same trial are logically impossible. The court must follow the verdict of the jury. *Knell* v. *Feltman*, 85 U. S. App. D. C. 22, 174 F. 2d 662, 665; *Drago* v. *A/S Inger*, 2 Cir., 305 F. 2d 139, 141." (Page 37 of Appendix to Petition).

The stevedore did not present any evidence that it was impossible for it to have discharged this cargo in a manner which would have prevented injury. The testimony of their expert,—who was called upon to testify after the jury had already made its finding of fact—was merely to the effect that chocking to stabilize the cargo was not necessary, nor was it necessary to lay dunnage boards down between the tiers of the cargo, and that, even if there were no dunnage used in stowing the cargo, it nevertheless, was stowed properly and the stevedore's expert drew the conclusion that the accident to the plaintiff could have occurred only as a result of a "latent defect" in a "board" in the "veneer" top of a cargo case.

If, as the stevedore now asserts in its petition, there was no way in which it could have discharged this cargo with reasonable safety, and thus prevented the injury to the plaintiff, then testimony to that effect should have been

presented to the District Court. In that manner, the issue of whether the Stevedore acted reasonably in the face of a hazardous working condition could have been decided as a question of fact. The Stevedore chose to concede that it was negligent to continue to unload, but argued that there was no dangerous condition and, if there were, it did not cause the injury. The jury decided otherwise. The Petitioner is asking the Supreme Court of the United States to make a finding of fact that it, as a stevedore contractor, could not have taken any reasonable steps to prevent the injury to its own employee, merely on statements made in the Petition, although no evidence to that effect was ever submitted.

(b) *The Opinion of the Court of Appeals is not contrary to any principle enunciated by this court, or to any decisions of this court.*

The Petitioner implies that the Court of Appeals ignored the findings of fact of the District Court without deciding that the District Court's findings of fact were obviously against the weight of the evidence, or were "clearly erroneous" (Civ. Rule 52(a)).

The Court of Appeals did not ignore,—nor did it overrule—the findings of fact of the District Court. Rather, the Court of Appeals held, as a matter of law that the finding that the injury to the plaintiff had been caused by a "latent defect" in a "blind board" of a "veneer" top of a case could not be made since it was directly contrary to the findings of fact implicit in the jury verdict.

Petitioner does not contest either the propriety under the law or the necessity under the facts, for the Court of Appeals' holding that the "latent defect" finding by the District Court was contrary to the only finding which

could be implicit in the jury verdict,—to wit, that the injury to the plaintiff resulted from a hazardous working condition due to "topsy turvy", "tilted", "wobbly" cargo cases, as a consequence of the cargo being stowed without dunnage; nor does the Petitioner question that it was its duty as a stevedore contractor to remedy hazardous working conditions before permitting its longshoremen to perform the work of stevedoring.

In view of these incontestable statements of law and fact, it is absurd for the Petitioner to complain that the Court of Appeals refused to follow a finding of fact by the District Court and awarded the shipowner "automatic indemnity".

(c) *The law fully supports the conclusion that under the Jury's findings the Stevedore contractor was negligent.*

The Court of Appeals put the point very clearly when it said (311 F. 2d 413, 415):

> "* * * The testimony was that the allegedly dangerous condition of the stowage was obvious and that the stevedore nevertheless went ahead with the work. This would constitute a breach of the stevedore's warranty to the shipowner of safe performance of the work and render the stevedore liable for indemnity. De Gioia *v.* United States Lines Company, 2 Cir., 304 F. 2d 421."

Far from there being a conflict in the Courts on this point, every Court of Appeals that has examined the question has decided it in the same way. No one, perhaps, has better explained the philosophy behind the legal theory that the stevedore must be responsible for the prevention of injuries to his own employees where such prevention is within his control than District Court Judge Mathes in

Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (D. C. S. D. Cal. 1959; aff'd 274 F. 2d 875; cert. den. 363 U. S. 803 (1960), at Page 609 of 170 F. Supp.:

> "The stevedoring contractor represents himself to be, and is assumed to be, expert and experienced in the work of loading and unloading cargo, while the individual longshoreman may or may not be * * *"

and continuing at Page 610

> "The stevedore contractor knows that the ship has been at sea; that she may be in every respect dangerous to the life and limb of the unskilled person; that if a condition is found which is unsafe for the professional longshoreman, as a rule the contractor can remedy it at the expense of the shipowner; that if the stevedoring operations are thereby delayed, the shipowner normally must pay for standby time.
>
> "Stevedoring contractors hold themselves out as being trained and equipped to cope with these conditions and these dangers. To this end, the stevedoring contractor is usually given full use and charge of the ship's loading and unloading equipment and appliances and the cargo hatches and holds. So it is that the stevedoring contractor cannot reasonably expect, and does not expect, to board a vessel which in all respects, as to equipment and appliances as well as hull, is in a seaworthy condition, or even in a reasonably safe condition."

In affirming Judge Mathes' decision, the Court of Appeals for the Ninth Circuit said at 274 F. 2d 875, that

> "* * * the policy considerations discussed by the court below seem valid (a) the possibility, or even probability of unseaworthiness after long voyages, and (b) the expertise of the stevedoring company and its employees."

The same legal reasoning supports the decision of the Fourth Circuit in *Smith* v. *Jugosalvenska Linijska Plovidea*, 278 F. 2d 176 (4 Cir. 1960); and in *American Export Lines, Inc.* v. *Revel*, 266 F. 2d 82 (4 Cir. 1959); and of the Court of Appeals for the Second Circuit in *Parenzan* v. *Iino Kaiun Kabushiki Kaisya*, 251 F. 2d 928 (2 Cir. 1958); and in *Santomarco* v. *U. S. A.*, 277 F. 2d 255 (2 Cir. 1960) cert. den. 364 U. S. 823 (1960); *Shannon* v. *United States*, 235 F. 2d 457 (2 Cir. 1956); and in numerous District Court cases such as *Weigel* v. *M/V Belgrano*, 188 F. Supp. 605 (D. C. Oregon, 1960); *Nordeutsher Lloyd* v. *Brady-Hamilton Stevedoring Co.*, 195 F. Supp. 680 (1961); and *Cook* v. *M/V Wasaborg*, 189 F. Supp. 464 (D. C. Oregon, 1960).

These numerous decisions which, in effect, require that a stevedoring contractor must control the stevedoring work, since he is the expert in that field, are recognized by the shipping industry. At the Brooklyn Army Terminal, where the accident to the plaintiff occurred, both the stevedores and the shipowners worked pursuant to a "Maritime Safety Code for Stevedoring and Freight Handling" which contained recommended safety requirements for stevedoring in the entire port of New York. This Code provides that the stevedore's supervisory employee has the duty "to order work stopped temporarily to prevent personal injuries where conditions in his judgment so warrant." [Page 102a-Appendix]

Furthermore, the president of the third-party defendant in this case, Jack G. Imparato, in his testimony before the District Court agreed that it was the responsibility of his supervising employees to make certain that the place of work was safe before permitting the stevedoring work to continue. [Page 106a-Appendix]

In addition, the Chief of Pier Operations at the Brooklyn Army Terminal testified that it is the practice at that

Terminal for the supervisory employees of the stevedore contractor to order work stopped when a dangerous condition is encountered in the stevedoring operations. [Page 92a-Appendix]

It is apparent, therefore, that the opinion of the Court of Appeals in this case and the decisions of every Court of Appeals that has examined this matter,—or, indeed, every District Court that has done so—places the responsibility to avoid risk of injury to the longshoremen employees exactly where it belongs, upon the stevedore employer. As if to emphasize the correctness of the holding of these opinions, the United States Department of Labor promulgated certain "safety and health regulations for longshoremen" (29 Code of Federal Regulations, Sub-part (a) S.9.2), which specifically recognize that the full responsibility for the safety of its own employees during cargo handling must be borne by the stevedore contractor as employer of the longshoremen.

Statistics on injuries to longshoremen kept by the Department of Labor since the enactment of these regulations show dramatically that the philosophy of putting the responsibility for the safety of his men on the stevedore has resulted in a reduction of longshore injuries. These statistics indicate that the frequency rate of nation-wide longshore injuries per million man hours of employment has been reduced from 131.8 in 1960 to 125.3 in 1961; and further reduced to 113.7 for the first 6 months of 1962. The frequency rate of longshoremen's injuries in New York has been reduced from 117.9 in 1960 to 102.2 in 1961; with a further reduction to 97.2 for the first 6 months of 1962.

These Department of Labor regulations were drafted after the nation-wide hearings at which the informed members of shipping and stevedoring communities and representatives of longshore unions expressed their views. It

was generally agreed that the resulting regulations constitute a codification of what had been recognized in the trade at the time they were adopted as reasonably safe working practices.

Conclusion.

The so-called "Questions Presented" in the petition do not now,—and never did—exist in the case. They are creations of the Petitioner.

The legal issues decided by the Court of Appeals are well settled and based on sound legal reasoning and philosophy. The Petitioner has made no attempt to question these conclusions.

This is one of the many cases decided in recent years which place the responsibility for the prevention of injury to longshoremen on the stevedore employer. No case has held to the contrary. The shipping industry has recognized this practice and the Department of Labor Regulations has codified this custom. The enforcement of the theme that "Stevedoring is the responsibility of the Stevedore" has resulted in a steady decline in the number of injuries in the stevedoring industry.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Joseph M. Cunningham,
Counsel for Respondent,
United States Lines Company,
120 Broadway,
New York 5, N. Y.

Vernon S. Jones,
of Counsel.